

(1997) 08 DEL CK 0074

In the Delhi High Court

Case No : Civil Writ Appeal No. 3603 of 1990

Niranjan Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-08-1997

Acts Referred:

Army Act, 1950 — Section 20(1)
Army Rules, 1954 — Rule 14

Citation : (1997) 68 DLT 850 : (1997) 43 DRJ 211

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : M.G. Kapoor and B.S. Saini, for the Appellant;

Judgement

Usha Mehra, J.

(1) Petitioner while working as Naib Subedar took annual leave in July, 1983 in order to appear in metriculation Examination of U.P.Board of Secondary Education at Jhansi Centre. The said examination commenced from 12th July, 1983. According to the petitioner he secured second division in the metriculation examination held in July, 1983. He produced his certificate and the marksheet to the respondent. His unit published the order for the qualification attained by the petitioner. The order attaining the qualification was published on 16th March, 1985. However, on 27th April, 1987 the Record Office wrote to the petitioner's unit to cancel the Part-II order because according to him on verification from the U.P.Board of Secondary Education it was found that the certificate produced by the petitioner was bogus. Petitioner brought to the notice of the Record Officer that wrong roll number had been verified by him. The petitioner's roll number was 47321 whereas the Department made the verification in respect of Roll No. 46321. Instead of re-verifying, the Record Officer ordered initiation of disciplinary proceedings against the petitioner. Accordingly in May, 1987 Court of Enquiry was conducted on the alleged mis-conduct. On 22nd June, 1988 on the certificate being got re-verified from the U.P. Board of Secondary Education it

was confirmed that the petitioner's name existed in the record against Roll No. 47321 as having passed the matriculation Examination in second division in 1983. The re-verification of the certificate was got done by the Artillery Centre, Hyderabad. Thereafter no action was taken against the petitioner but suddenly on 22nd January, 1990 after a lapse of three years, show cause notice was issued to the petitioner as to why his service should not be terminated u/s 20(1) of the Army Act read with Army Rule 17 administratively as in the opinion of the Chief of the Army Staff petitioner's trial by Court Martial for the said offence was impracticable having become time barred and that the petitioner's further retention in service was undesirable. Petitioner refuted the averments made in the show cause notice vide his reply dated 28th February, 1990. Respondent No. 3 without application of mind terminated the service of the petitioner u/s 20(1) of the Army Act read with Army Rule 17 for the alleged offence committed u/s 57(e) of the Army Act.

(2) Aggrieved by this order, the present petition has been filed primarily on the ground that once the Court Martial having become time barred the respondent had no jurisdiction to terminate the service of the petitioner administratively. According to Mr. M.G. Kapur, counsel for the petitioner once the period of limitation of Court Martial had expired, the respondent could not resort to the order of termination administratively. In this regard he has placed reliance on the decision of this Court in the case of Lt.Col. H.C. Dhingra Vs. Union of India & Anr., CW.No. 639/88 reported in 1988(2) Delhi Lawyer (DB) page 109 as well as in the case of Lt.Col.Satish Puri Vs. Union of India & Ors., CW.No. 841/90 decided on 7th May, 1990. Mr. Kapur brought to the notice of this Court that respondent / Union of India filed an SLP against the order of Division Bench in the case of Lt.Col.H.C.Dhingra. The said SLP was dismissed by the Supreme Court. Thus, the order of the Division Bench in Lt.Col.H.C.Dhingra governs the facts in this case. He has further placed reliance on the decision of the Supreme Court in the case of Major Radha Krishan Vs. Union of India and Others, . In this case the Apex Court approves the decision in the case of Lt.Col.H.C.Dhingra. In that case the Supreme Court was seized of the interpretation of Sections 19 and 122 read with Rule 14 of the Army Rules, 1954. While interpreting these sections and the rules, the Apex Court observed that "termination of service of the petitioner was on account of misconduct. The trial by the Court Martial had become time barred. Respondent resorted to Rule 14. The Court opined that once the period of limitation for holding the Court Martial was over, authorities could not take action under Rule 14(2) of the Army Rules. It was further observed that so long as an Officer can be legally tried by a Court Martial, the concerned authorities may on the ground that such a trial is not impracticable or inexpedient invoke Rule 14(2) but once the period of limitation of such a trial is over the authorities cannot take action under Rule 14(2) or under Sections 19 and 122 of the Army Act. The Supreme Court observed as under:-

"Its not in dispute that at the time the impugned notice was sent, no trial of the appellant by Court Martial could be held for sub-section (1) of Section 122 (as it

then stood) clearly envisaged that it should not be commenced after expiration of three years from the date of commission of the offence which in the instant case was about 7 years prior to the issuance of the notice. Indeed, as seen earlier, in the notice itself it is stated that the trial had become time barred. When, the trial itself was legally impossible and impermissible the question of its being impracticable in our view cannot or does not arise. "Impracticability" is a concept different from "impossibility" for while the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice."

(3) In the case in hand by the impugned order dated 22nd January, 1990 it was intimated to the petitioner in para No. 2 of the show cause notice as under:-

"Your case was placed before the Chief of the Army Staff, who is of the opinion that your trial by Court Martial for the above mentioned offence, is impracticable being time barred and your further retention in service is undesirable."

(4) Mr. Kapur contended that there is wide difference between the words "impracticable" and "impossible". "Impracticable" presupposes that the action is possible but owing to certain practical difficulties or other reasons it is incapable of being performed. The same principle will equally apply to satisfy the test of "inexpedient" as it means not expedient, disadvantageous in the circumstances, inadvisable etc. It must, Therefore, be held that so long as an officer can be legally tried by a Court Martial the concerned authorities may, on the ground that such a trial is not impracticable or inexpedient, invoke Rule 14(2). In other words, once the period of limitation of such a trial is over the authorities cannot take action under Rule 14(2).

(5) On the other hand, Mr. Bhupinder Singh appearing for the respondent contended that Supreme Court in the case of Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, held that Chief of the Army Staff can resort to Rule 14 particularly when Chief of the Army staff is of the opinion that further retention of the Officer is undesirable. I am afraid this case is of no help to Mr. Bhupinder Singh because in that case Court Martial proceedings had taken place, but the finding of the court Martial on revision was not confirmed. It was in this background it was thought that fresh trial by another Court Martial was not permissible. In those circumstances the Chief of the Army Staff resorted to Rule 14 and issued notice. The facts of that case before the Apex Court were different, Therefore, it opined that such a notice was not without jurisdiction nor unwarranted. But in the case in hand the Court Martial never took place. As admitted by the respondent in its show cause notice that Court Martial was impracticable since it had become time barred, Therefore, resorting to administrative remedy was bad in law. Therefore, facts of the case of Major Dharam Pal Kukrety (supra) and that of the present case are quite distinguishable. The decision rendered in the case of Major Dharam Pal Kukrety is of no help to the respondent. Similarly, reliance by Mr. Bhupinder Singh on the case of Union of India and others Vs. Ram Pal, is of no help to him because in

that case the Court was concerned with the dismissal of Border Security Officer under the Border Security Force Act and the Rules made therein. In that case the official was absent for a long period without leave, Therefore, it was considered that his further retention was undesirable. It is in this background that the Court opined that dismissal was justified because prescribed procedure must be presumed to have been followed before passing the dismissal order. In that case, the procedure prescribed under Rule 20 was followed and, Therefore, the Court was satisfied with the order passed. But that is not the case in hand. Under the Army Act and the Rules made there under once the Court Martial becomes time barred and fresh Court Martial being not possible, the concerned authority could not terminate the services by resorting to administrative method as held in the case of *Lt.Col.H.C.Dhingra* and *Major Radha Krishan* (supra). In fact the respondent has not been able to point out any authority which provides that even if the Court Martial becomes time barred, the respondent could resort to Rule 14(2) of the Army Act in order to terminate the services of an army official.

(6) So far as the period of limitation of trial by the Court Martial is concerned, that is governed by Section 122 of the Army Act which is a complete code in itself. Admittedly, no provision has been made under the Act for extending the period of limitation prescribed u/s 122 of the Army Act, Therefore, it becomes obvious that any trial commenced after the period of limitation will be patently illegal. Therefore, the provision of limitation, which is not otherwise extendable under the Act, cannot be over ridden or circumvented by an administrative act done in exercise of powers conferred under the Rules. Power under Rule 14 of the Army Rules cannot be exercised in a manner which would get over the bar of limitation laid down in the Act. If Rule 14 was to be interpreted to give such a power which would negate the provision of the Army Act itself and that being possible such a power would be test of law. The Supreme Court in the case of *Major Radha Krishan* (supra) approved the decision of this Court in the case of *Lt.Col.H.C.Dhingra* (supra) wherein it was observed that in purported exercise of administrative power under Rule 14, in respect of allegations of misconduct triable by General Court Martial the authorities cannot override the statutory bar of sub-section (1) of Section 122 of the Act. No administrative act or fiat can discard, destroy or annul a statutory provision. While analysing the provision of Rule 14, the Apex Court in the case of *Major-Radha Krishan* (supra) observed that before invoking this provision it necessarily means that mis-conduct and other attending circumstances relating thereto have to be the sole basis for obtaining such a satisfaction. The Supreme Court in the said case gave an illustration to show that in what circumstances it becomes impracticable or inexpedient to hold a trial and to resort to Rule 14. The illustration given by the Supreme Court reads as under:-

"The Chief of the Army Staff receives a report which reveals that an Army Officer has treacherously communicated intelligence to the enemy - an offence punishable u/s 34 of the Act. He, however, finds that to successfully prosecute the officer it will be necessary to examine some witnesses, ensuring presence of

whom will not be feasible and exhibit some documents, disclosure of which will not be advisable in the interest of the security of the State. In such an eventuality he may legitimately invoke the Rule to dispense with the trial on the grounds that it would be impracticable and/or inexpedient. But to dispense with a trial on a satisfaction de hors the mis-conduct - like the bar of limitation in the present case - will be wholly alien to Rule 14(2)."

(7) Relying on the observations of this Court in the case of Lt.Col.H.C.Dhingra (Supra) and of Supreme Court in the case of the Major Radha Krishan (Supra), one can only conclude that the impugned action of the respondent in the present case was bad in law and hence cannot be sustained. The Court Martial became time barred in 1990 when show cause notice was issued and record Officer ordered initiation of disciplinary proceedings. In 1987 Court of Enquiry was conducted and, thereafter, nothing happened. Hence, when in February, 1990 impugned notice was issued three years period had already elapsed. Respondent could not have resorted to the action of terminating the service of the petitioner administratively because u/s 57(e) of the Act, the alleged offence charged against the petitioner was triable by a Court Martial. Since the Court Martial proceedings had become time barred, respondent could not resort to Rule 14 nor could terminate the service of the petitioner without following the procedure. The impugned show cause notice dated 22nd January, 1990 as well as order of dismissal dated 6th September, 1990 and 17th October, 1990 hence being bad in law have to be set aside. Order accordingly. The petitioner shall be deemed to be in service till superannuated. He will also be entitled to back wages.